The Impact of Anti-COVID-19 Pandemic Measures on Access to Justice in Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Ukraine and Uzbekistan

A Briefing Paper
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I. Introduction

1. In any emergency or crisis situation, judicial oversight of the exceptional measures taken by the State is essential to the rule of law and the protection of human rights. As anti-COVID-19 pandemic measures have affected many spheres of functioning of the State and society, they have affected justice systems to the extent that their normal operation was interrupted, suspended or adjusted to the new circumstances. While such measures may have been seen as necessary to effectively tackle the pandemic, the limited operation of the courts, as well as limitations on access to legal advice, have implications for access to justice and the right to a fair trial. They also raise questions of the capacity of the judicial system to provide redress for possible violations of human rights related to the pandemic and the consequent emergency measures. In this regard, States’ obligations under international human rights law, which continue to apply in times of crisis, must be central to their COVID-19 response.2

2. In this briefing paper, the ICJ outlines measures affecting the court system and access to justice which have been introduced in response to COVID-19 in a number of countries of the Commonwealth of Independent States (CIS), and which by their nature touch upon legal obligations of States under international human rights law, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and for member States of the Council of Europe, the European Convention on Human Rights (ECHR). In particular, in this paper the ICJ considers access to the justice and the court systems in Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Ukraine and Uzbekistan. It considers the issue of the legislative framework governing the restrictive measures, as well as the problems of access to lawyers and courts in relation to the COVID-19 restrictions.

3. This briefing paper should be read in conjunction with the ICJ’s general briefing note on COVID-19 and the Courts,3 which explains relevant international laws and standards in more detail.

II. Protection of human rights during states of emergency

4. During emergency situations, international human rights law continues to apply. All persons must have access to legal advice, and to fair and effective judicial proceedings, including to challenge the legality of emergency measures. Where there is declared public emergency which threatens the life of the nation, international human rights law allows for States to derogate from certain human rights obligations, subject to certain conditions including necessity, proportionality, non-discrimination, and time-limitedness.4 Yet, certain rights can never be derogated from.5 International human rights standards and jurisprudence have considered the right to challenge the lawfulness of detention before a tribunal, court or judge

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4 ICCPR, Article 4.
5 Non-derogable rights include: in the case of the International Covenant on Civil and Political Rights: the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, freedom from slavery and servitude, freedom from imprisonment for failure to fulfil a contractual obligation, freedom from retrospective criminal liability, the right to recognition as a person before the law and the right to freedom of thought, conscience and religion (Articles 6, 7, 8.1, 8.2, 11, 15, 16 and 18). European Convention for the Protection of Human Rights and Fundamental Freedoms: the right to life, freedom from torture or inhuman or degrading treatment or punishment, freedom from slavery or servitude and freedom from retrospective liability (Articles 2, 3, 4.1 and 7). See also Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.
5. The Human Rights Committee, under the ICCPR, has issued a Statement on derogations from the Covenant in connection with the COVID-19 pandemic. Among other things it reaffirms that, "States parties may not resort to emergency powers or implement derogating measures in a manner that is discriminatory, or that violates other obligations that they have undertaken under international law, including under other international human rights treaties from which no derogation is allowed. Nor can States parties deviate from the non-derogable provisions of the Covenant ... or from other rights that are essential for upholding the non-derogable rights found in the aforementioned provisions and for ensuring respect for the rule of law and the principle of legality even in times of public emergency, including the right of access to court, due process guarantees and the right of victims to obtain an effective remedy". The Human Rights Committee has emphasised that, "Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times".

6. The UN Human Rights Council has adopted, unanimously, a President’s statement on Human Rights implications of COVID-19, which among other things reaffirms that, “emergency measures taken by Governments in response to the COVID-19 pandemic must be necessary, proportionate to the evaluated risk and applied in a non-discriminatory way, have a specific focus and duration, and be in accordance with the State’s obligations under applicable international human rights law”.

7. Among the countries considered in this briefing paper only Kyrgyz Republic followed the process for notification of derogation from its relevant human rights obligations under the treaties. It has notified the UN Secretary General of derogations to the International Covenant on Civil and Political Rights.

8. All of the countries considered in this briefing paper have legal frameworks that define the procedure for declaration of the state of emergency. Only Kazakhstan and Kyrgyzstan invoked these provisions and declared the state of emergency. Azerbaijan considered this as an effectively non-derogable right. The Working Group on Arbitrary Detention, among others, has underlined that the right to challenge the legality of detention or to petition for a writ of habeas corpus or remedy of amparo must in all circumstances be guaranteed.


possible, but did not declare it. Russia on the federal level declared the “high alert regime” leaving it to regions to decide on the preventive measures.14 In Ukraine the government declared the emergency situation, which is different from the state of emergency.15 Uzbekistan did not introduce a state of emergency.16 While only one of the states followed the process for notification of derogations under international treaties, and only two introduced the state of emergency under national law, which contains legal framework for temporary restrictions, including on the freedom of movement, different countries established specialised headquarters or commissions charged with the powers to adopt, coordinate and implement preventative anti-COVID-19 measures. The legal framework and the status quo are considered is somewhat greater detail below.

9. In Azerbaijan, the law provides that the President “declares the state of emergency in separate regions of the Republic of Azerbaijan and, within 24 hours, submits an appropriate decree to the Milly Majlis [the Parliament] of the Republic of Azerbaijan for approval” in case “of natural disasters or epidemic, epizootic, severe ecological and other disasters; the commission of acts directed at violating the territorial integrity of the Republic of Azerbaijan, insurrections or coups d’état; mass disorders accompanied by violence; other conflicts threatening the lives and security of citizens, or the normal activities of State bodies”.17 The particular measures which can be adopted during the state of emergency are listed in the Law on State of Emergency; according to Article 6 of which the state of emergency cannot last longer than 60 days.18

10. The President of Azerbaijan did not invoke the power to declare the state of emergency. On 27 February 2020, an Operational headquarters was established under the Cabinet of Ministers to implement preventative measures.19 The Headquarters declared quarantine on 14 March and on 18 April extended its terms until 4 May 202020 and on 1 May until 31 May 202021.

11. In Kazakhstan the President of the Republic “after official consultations with the Prime Minister and the Chairpersons of the Chambers of the Parliament of the Republic [declares] the state of emergency pursuant to the Constitution of the Republic of Kazakhstan for approval” in case of natural disasters or epidemic, epizootic outbreak, epiphytoty, the use of lesions, or other dangerous situation that has caused (could cause) a threat to the life or health of the population, a large number of dead and injured, inflicting significant material losses and the inability to people living in that territory or facility, conducting business activities on such territory, communications Department of the Secretariat of the Cabinet of Ministers of Ukraine, 25 March 2020, https://www.kmu.gov.ua/en/news/ukiyivskii-oblasti-vstanovleno-rezhim-nadzvichajnoyi-situaciyi-rihennyua-uryadu; Communications Department of the Secretariat of the Cabinet of Ministers of Ukraine, 25 March 2020, https://www.kmu.gov.ua/en/news/uryad-zaprovadiv-rezhim-nadzvichajnoyi-situaciyi-po-vsij-territorii-ukrains`ho.

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High alert due to coronavirus introduced throughout Russia, TASS.ru, 19 March.
15 According to Article 2 of the Civil Protection Code of Ukraine, an emergency situation is a situation in a particular territory or a business entity on such territory, or a water body characterized by a violation of normal living conditions caused by a catastrophe, accident, fire, natural disaster, epidemic, epizootic outbreak, epiphytoty, the use of lesions, or other dangerous situation that has caused (could cause) a threat to the life or health of the population, a large number of dead and injured, inflicting significant material losses and the inability to people living in that territory or facility, conducting business activities on such territory, Communications Department of the Secretariat of the Cabinet of Ministers of Ukraine, 25 March 2020, https://www.kmu.gov.ua/en/news/ukiyivskii-oblasti-vstanovleno-rezhim-nadzvichajnoyi-situaciyi-rihennyua-uryadu; Communications Department of the Secretariat of the Cabinet of Ministers of Ukraine, 25 March 2020, https://www.kmu.gov.ua/en/news/uryad-zaprovadiv-rezhim-nadzvichajnoyi-situaciyi-po-vsij-territorii-ukrains`ho.
a state of emergency”. On 15 March 2020, the President declared the state of emergency. Initially the state of emergency should have lasted from 16 March until 15 April, and on 14 April the President prolonged it until 1 May 2020 and on 29 April 2020 until 11 May 2020. On 15 March the President created the State Commission on implementation of the regime of the state emergency under the President of Kazakhstan, charged with powers to adopt preventive measures.

12. In Kyrgyzstan the President of Kyrgyzstan “gives a warning, on the grounds specified by constitutional law, of the possibility of introducing the state of emergency, and where necessary, introduces the state of emergency in separate regions without prior declaration, providing prompt notification to the Jogorku Kenesh [the Parliament]”. The Parliament “introduces the state of emergency in cases and in accordance with the procedure envisaged in the constitutional law, approves or repeals Presidential decrees on this matter”. The terms of the state of emergency in separate regions cannot exceed 30 days, and 60 days – in the territory of all of Kyrgyzstan.

13. On 27 January, the Republican Headquarters charged with adoption of preventative measures was created. Its work was later given a negative assessment by the Security Council of Kyrgyzstan. In particular it was assessed that certain members of the Government failed to take the necessary measures, including economic, social and administrative measures in the field of the prevention of the spread of the virus, as a result of which some ministers resigned on 1 April 2020. On 17 March 2020, the Government of the Kyrgyz Republic decided to take preventative measures. On 24 March 2020 the President declared and later prolonged the state of emergency in some regions until 10 May 2020, following the earlier extension until 30 April 2020.

24 Ibid.
29 Ibid., Article 74 section 5 (1).
32 Ibid.
35 The Decree of the President of the Kyrgyz Republic, 28 April 2020, http://www.president.kg/ru/sobytiya/ukazy/16597_prezident_sooronbay_qheenbekov_podpisal_ukaz_o_prodlennii_chrezvychaynogo_polodhieniya_na otdelnykh territoriyax stran; The decree covered the cities of Bishkek, Osh, Jalal-Abad, and At-Bashinsk district of the Narinsk region.
14. In the Russian Federation, according to the Constitution, the Council of Federation [the upper chamber of the Parliament] approves the presidential decree on the state of emergency. The Federal Constitutional Law “On the State of Emergency” mirrors this provision. The term of an All-Russian state of emergency cannot exceed 30 days, in separate regions it cannot exceed 60 days. On 1 April 2020, the Federal Law “On the Protection of the Population and Territories from Natural and Technogenic Emergencies” was amended to authorize the Government of the Russian Federation to declare the high-alert regime or a regime of emergency situation on the federal level.

15. No state of emergency has been declared in Russia. On 27 January, the Prime Minister issued a decision to create Headquarters on issues of control and prevention of coronavirus infection. On 19 March, all regions in Russia introduced the high-alert regime, which includes limitations on gatherings and closure of public places. On 25 March 2020, the President announced the following week to be “days-off”, which later were prolonged until the 30 April 2020. The legislative framework for application of such regime of prolonged days off caused uncertainty. In some regions the high alert regime was extended until 11 May 2020.

16. In Ukraine, the President declares the state of emergency by a decree, which is subject to approval by the Verkhovna Rada [the Parliament]. The President has not invoked these powers. On 24 March 2020, the Cabinet of Ministers declared the “emergency situation” until 24 April, introducing restrictive measures, which were severed on 2 April 2020 and later extended until 11 May 2020. On 26 March, the Anti-crisis headquarters on prevention of the spread of coronavirus was created.

17. In Uzbekistan, the President of the country is also charged with the powers to "introduce the state of emergency on the entire territory or in separate regions of the Republic of Uzbekistan and within seventy two hours to submit the adopted decision for approval by the chambers of the Oliy Majlis [the Parliament] of the Republic of Uzbekistan.” The President of Uzbekistan did not officially announce the state of emergency. On 29 January 2020, the

39 Ibid., Article 9 (2).
45 Decree, Head of Moscow District, 28 April 2020, https://mosreg.ru/download/document/1064225
47 Decree, Head of Moscow District, 28 April 2020, https://mosreg.ru/download/document/1064225
49 Announcement was made via official telegram channel on COVID-19: https://t.me/koronavirusinfouz (Accessed 20 April 2020).
President created a Special Commission on preparation of programme of preventive measures against spread of the coronavirus in Uzbekistan. The Commission is charged with organization of preventive measures in Uzbekistan. The latter are published in its official telegram-channel, which leaves open the question as to the legal nature of the decisions published mainly on this social network rather than other official sources mentioned by the Law on Normative Legal Acts.

III. Preventative measures and the right of access to a lawyer

18. The essential role that lawyers play in the protection of human rights becomes even more vital in times of crisis or states of emergency. In particular, lawyers play an important role in protection of the right to a fair trial, the right to liberty, freedom from torture or other ill-treatment in detention, and in ensuring accountability and effective remedies for violations of human rights. Under Article 14(3)(b) of the ICCPR, everyone charged with a criminal offence is entitled "[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing". In its General Comment No. 32 (2007), the Human Rights Committee considered that the right to communicate with a lawyer of one's own choosing is an important element of the guarantee of a fair trial and an application of the principle of equality of arms. Access to a lawyer for a person deprived of liberty must be prompt and authorities must respect the confidentiality of all communications between lawyers and clients. Furthermore, lawyers should be able to advise and to represent clients without intimidation, hindrance, harassment or improper interference.

19. The restrictive measures introduced in several of the States considered in this briefing paper have impacted on the lawyers’ ability to freely move and have access to, for example, detention facilities, and some lawyers have had to switch fully to remote work. There were reports that these limitations resulted in inability of lawyers to meet with their clients. In Azerbaijan following the uncertainties and concerns whether the restrictions on the movement and transportation applied to the lawyers or not and their access to clients, on 2 April 2020 the Cabinet of Ministers made clear that as of 5 April 2020, advocates were included in the list of the professions authorized to carry out professional duties.

20. Visits to detention facilities have been prohibited in Kazakhstan and Kyrgyzstan during the COVID-19 epidemic. On 4 April, in Kazakhstan the visits to detention facilities were stopped, lawyers could only see their clients via videoconference. In Kyrgyzstan, lawyers provided free legal aid remotely via telephone calls, messengers, by e-mail and via social media, including Instagram. How and if this exclusive reliance on social media and digital means of legal consultation may meet the requirements of the right to have "adequate time and facilities" for preparation of a defence remains to be examined. Yet, the ICJ notes that unless such communication ensures the lawyer-client secrecy, it will interfere with a number of human rights, including the prohibition of arbitrary or unlawful interference with privacy or

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54 Ibid.
57 ICJ, Legal Commentary to the Geneva Declaration, pp112-113
58 Article 19 ICCPR, Article 6 ECHR
59 Article 9 ICCPR, Article 5 ECHR
60 UN Convention Against Torture, Article 7 ICCPR, Article 3 ECHR
61 ICCPR, Article 14.3(b).
62 HRC General Comment No. 32, op. cit., para. 40.
64 Ibid. principles 8 and 22.
65 Ibid. principle 16.
correspondence under Article 17 of the ICCPR, and the right to a fair trial under Article 14 of the ICCPR, including the right to private communication with a lawyer.

21. On 18 March the Federal Penitentiary Service of the Russia Federation limited the visits of relatives to places of detention throughout Russia.69 Visits of lawyers to detention facilities were also limited.70 Meetings with lawyers were organised in rooms designed for meetings with relatives.71 Besides, it was reported that lawyers in Russia claimed that telephones used for conversation in visitors’ rooms were overheard by the staff of the place of detention.72

22. In Moscow, since 31 March, conditions became more stringent: only one pre-trial detention facility admitted detainees, admittance of all parcels was stopped, transportation of suspects, the accused and participation of persons in detention in investigative activities was suspended.73 On 10 April, the Mayor of Moscow introduced a ban on leaving homes except in emergency cases and transportation to/from work, if the place of work was not prohibited to visit, purchase of the food or medicine.74 Lawyers, who are members of the Bar are authorized to move on professional needs around the city after on-line registration with lawyers’ ID.75 In general, lawyers in different regions of Russia were reported to increasingly prefer to work remotely.76

23. In Ukraine lawyers continued to practice normally, including visiting detention facilities and courts: the quarantine introduced on 13 March 2020 in places of detention did not limit visits of lawyers.77 The Ukrainian National Bar Association called on the government to provide masks and other protection equipment and facilitate the transportation of lawyers providing free legal aid to their clients.78

24. In Uzbekistan, visits to detention facilities for relatives were restricted.79 Transportation was limited for most of the population and to use personal transport, special stickers were introduced and the Ministry of Justice published a list of professions which did not require to obtain a special travel sticker.80 The list included all government organizations and law enforcement, while members of the Chamber of Lawyers were not included on the list.81 On 9 April, Uzbekistan stopped issuing the stickers.82 The Ministry of Justice clarified that the law enforcement authorities could “accompany” lawyers with their vehicles to participate in “judicial and investigative activities”83, besides special stickers were allocated for the management of the Chamber of Lawyers and its territorial branches which could use with...
their vehicles.84 The Ministry of Justice states that in emergency cases it would provide lawyers with vehicles of the Ministry.85 Moreover, the Ministry of Internal Affairs allowed to carry out investigative activities via videoconference.86

25. In Azerbaijan visits to detention facilities of the relatives of the detained and prisoners had been prohibited87. However, lawyers were allowed to have access to the detention facilities under “the special procedure”, which was not clarified in the text of instruction of the Ministry of Justice. In some detention facilities the lawyers had been required to produce the medical document – result of the COVID-19 test in order to have access to the facility. Reportedly, this practice has been stopped as of 14 May 202088.

IV. Preventative measures affecting the work of courts

26. The judiciary plays an essential role in securing the rule of law by ensuring that the actions of the other branches of government respect the law.89 This role becomes even more important in times of emergency or other crisis, and yet it is precisely in those situations that it is most often limited or threatened.90

27. The right of access to court is a right guaranteed by Article 14 the ICCPR, Article 6 of the ECHR as well as multiple other treaties. According to the international law, all trials must be open to public which ensures transparency of proceedings and thus provides an important safeguard for the interest of the individual and society in whole.91 In exceptional circumstances, the public, including the media, can be excluded from all or part of a trial.92 These exceptional circumstances are restricted to when it is strictly necessary to protect the interests of justice (for example when it is necessary to protect witnesses);93 when certain considerations involving private lives of the parties so require (for example, in cases involving the trial of juveniles, cases in which juveniles or children are victims or those in which the identity of victims of sexual violence needs to be protected);94 or when it is strictly necessary for reasons of public order, morals or national security.95 "Public health" is in fact not listed as among the possible reasons for excluding the public from hearings to which article 14 ICCPR or article 6 European Convention applies, although it is included in other lists of grounds of exception elsewhere in these treaties; it is possible therefore that a derogation is required to generally exclude (i.e. without substituting videoconferencing or newmedia access) the public on public health grounds. Any restriction on public access must, furthermore, be strictly justified and be subject to on-going judicial supervision.96

85 Ibid.
88 Reportedly, this practice had been stopped following the Ministry of Justice’s instruction in this connection, https://report.az/hadise/vekiller-instintaq-tercixdankanalarina-arayissiz-buraxilacaq/.
91 General Comment No.32, Article 14: Right to equality before courts and tribunals and to a fair trial, para. 28. See also: European Court of Human Rights, Judgment of 8 December 1983, Axen v. Germany, Application No. 8273/78, para. 25; Inter-American Court of Human Rights, Judgment of 30 May 1999, Castillo Petruzzi et al. v. Peru, Series C No. 52, para. 172.
92 Article 14(1) of the International Covenant for Civil and Political Rights; Article 6(1) of the European Convention on Human Rights.
93 ECtHR, Ramos Nunes de Carvalho e Sá v. Portugal [GC], Applications Nos. 55391/13, 57728/13 and 74041/13, Judgement of 6 November 2018, para. 187.
94 ECtHR, B. and P. v. the United Kingdom, Applications nos. 36337/97 and 35974/97, 24 April 2001, para 38.
95 ECtHR, Zagorodnikov v. Russia, Application no. 6694/01, 07 September 2007, para. 26; ECtHR, B. and P. v. the United Kingdom, Applications nos. 36337/97 and 35974/97, Judgement of 24 April 2001, para. 39.
96 ECtHR, Chaushev and Others v. Russia, Nos. 37037/03, 39053/03 and 2469/04, 25/10/2016, § 24: when deciding to hold a hearing in camera, the domestic courts are required to provide sufficient reasoning for their decision demonstrating that close is strictly necessary within the meaning of Article 6 § 1 of the Convention; Ramos Nunes de Carvalho e Sá v. Portugal (GC), Nos. 55391/13 57728/13 74041/13,
28. By its decision of 19 March⁹⁷ and 23 April 2020⁹⁸, the Supreme Court of Azerbaijan recommended that the courts postpone the consideration of all cases with the exception of urgent ones and the cases which do not require oral court hearing⁹⁹ and hold hearings via the “Electronic Court” information system in civil cases and commercial disputes. On 2 May 2020, the Supreme Court extended the same recommendations until 31 May 2020 in respect of the courts that operate in some regions mentioned by the Cabinet of Ministers, while in some regions of Azerbaijan the courts resumed their activities with some restrictions as of 4 May 2020.¹⁰⁰ The Supreme Court also recommended submission of the complaints by post or email and seek the consultation by internet or telephone on account of the closure of the court buildings for the public.¹⁰¹

29. In Kazakhstan all court hearings were recommended to be held via videoconference, including via mobile app TRUECONF¹⁰² or other applications and with any device.¹⁰³ For example, the ICJ observed several online court hearings in the Kazakhstan courts via an online platform.¹⁰⁴ During the period of 26-31 March the courts hold 7 thousand hearings, among which 3 thousand hearings were with the participations of the parties.¹⁰⁵ Individuals are discouraged to participate in hearings in person.¹⁰⁶ Kazakhstan aimed to hold 100% of the hearings on-line by the end of April.¹⁰⁷ A new service “on-line-reconciliation” was launched, which offers the possibility to settle a dispute without applying to court.¹⁰⁸ While such logistical readiness may be welcome, at a trial observation conducted by the ICJ, a lawyer of one of the parties was excluded from the online hearing after posting questions to a judge, which the court insisted should not be asked.¹⁰⁹ She was never allowed to return to the online hearing. There appeared to be lack of clarity regarding conduct of lawyers during an online hearing, and clearly potential concerns were raised regarding the right to a defence and the principle of equality of arms, given the ease with which participants can be excluded from online hearings.

30. In Kyrgyzstan on 19 March, the Supreme Court decided to allow only participants of the court proceedings to be admitted to courts.¹¹⁰ Since 30 March work of some courts was

06/11/2018, § 210, “…dispensing with an oral hearing should be an exceptional measure and should be duly justified in the light of the Convention institutions’ case-law”.


⁹⁸ Ibid.


¹⁰⁰ Ibid.


¹⁰⁴ Ibid.


¹⁰⁷ Ibid.


suspended with the exception of duty judges and staff of the courts, \textsuperscript{111} including the Supreme Court of Kyrgyzstan.\textsuperscript{112}

31. In Russia on 18 March the Supreme Court ordered the courts to hold hearings only in urgent cases such as cases concerning imposition of restrictive measures, leaving to the courts the discretion to decide which case is urgent. \textsuperscript{113} It was also recommended to limit the presence in the court of those who are not the parties to the court proceedings.\textsuperscript{114} On 8 April, the Supreme Court adopted a new decision with recommendation to courts that all the documents should be submitted on-line or by post and that the hearings should be held via videoconference.\textsuperscript{115}

32. On 16 March 2020, the Council of Judges of Ukraine adopted a decision No. 9pc-186/20, which established a special regime of work of courts with the possibility of postponing the consideration of cases in connection with quarantine measures and prescribed other measures.\textsuperscript{116} On 13 April the Law "On the State Budget of Ukraine for 2020" was amended reducing salaries of judges.\textsuperscript{117}

33. The Supreme Court of the Uzbekistan recommended to submit all documents to courts in electronic form or by post.\textsuperscript{118} The courts should consider only urgent cases (to decide on remand in custody, to extend, change or abolish the duration of detention, involuntary hospitalization in mental and tuberculosis treatment institution and extension of its duration, administrative detention, cases on limitations of legal capacity, and mandative proceedings).\textsuperscript{119}

34. Courts in almost all the countries assessed for this paper were reported to experience technical problems while trying to change their way of work in a short period of time. In Kyrgyzstan, not all the courts are equipped with automated information systems, equipment of all the courts is planned to be finished in 2020.\textsuperscript{120} A similar situation exists in Ukraine: the courts were planned to be equipped with a uniform system for videoconference in 2019, which was not done.\textsuperscript{121} In Russia courts experience problems with videoconference, some of them use Skype, Zoom and WhatsApp to hold hearings, but the practice is not uniform.\textsuperscript{122} This slows down the work of court system making it inefficient.

\textsuperscript{112} The Supreme Court of the Kyrgyz Republic is closed on quarantine, Supreme Court of the Kyrgyz Republic, 27 March 2020. \url{http://sot.kg/post/verhovnyj-sud-kyrgyzskoj-republiki-zakryt-na-karantin} (Accessed 20 April 2020).
\textsuperscript{113} Order of the Presidium of the Supreme Court of the Russian Federation, the Presidium of the Council of Judges of the Russian Federation, of 18 March 2020 No. 808, \url{http://www.supcourt.ru/files/28814/}.
\textsuperscript{114} \textit{Ibid.}
\textsuperscript{119} \textit{Ibid.}
\textsuperscript{120} President Sooronbay Jeenbekov visits the Supreme Court, familiarizes himself with the process of digitalization of the judicial system, Supreme Court of the Republic of Kyrgyzstan, 13 March 2020. \url{http://sot.kg/post/prezident-sooronbai-jeenbekov-posetil-verhovnyj-sud-uzhokomislya-s-hodom-protseassa-tsifrovizatsii-sudebnoj-sistemy} (Accessed 20 April 2020).
35. Besides, in all courts the general public was banned from attending court hearings. The exception to this was Kazakhstan which arranged for participation of public online. In Ukraine it was reported that only some courts organized online streaming of hearings, which might compensate the physical absence of the public during the hearing.124

V. Preliminary conclusions

36. While this briefing paper provides only a glimpse of legal frameworks used to adjust the work of the justice systems in the CIS region, some preliminary conclusions can be made.

In regard to the use of emergency legislation

37. The countries concerned have emergency frameworks but it appears that they generally tend not to invoke them, nor do they tend to follow procedures to notify of derogations under international human rights treaties. Specialised emergency bodies have been created which are not provided for by law and in some cases this has led to questions as to the status of these bodies and the place of their decisions in the hierarchy of laws. In other words, the principle of legality may be jeopardised should States adopt legislation which through a procedure which does not meet the requirements of the national legal framework.

In regard to the access to a lawyer

38. The measures introduced in most of the States significantly negatively impacted on the ability of lawyers to carry out their functions in a due manner, therefore impeding access to a lawyer. In Azerbaijan and Uzbekistan, due to non-inclusion or a delay in inclusion of lawyers on the list of the professions who are authorise to move freely, concerns were expressed over lawyers’ ability to see clients, to attend courts, detention facilities and, therefore, enjoyment of human rights of those in detention under national and international law. It does not appear to be justified to introduce blanket restrictions on the use of private vehicles by all lawyers, without introducing sufficient measures to ensure that lawyers can travel to see their clients without being dependent on law enforcement personnel as it was the case in Uzbekistan. Access to means of transport by lawyers appears to be needed, where they need to travel to assist clients in detention or at trial.

39. Besides, the restrictive measures in detention facilities should not infringe the confidentiality of lawyer-client communication. Such concerns on confidentiality were reported in particular, in Kyrgyzstan and Kazakhstan, where the work of lawyers are limited to remote provision of legal services, as well as the Russian Federation.

In regard to the work of courts

40. States, where online systems were not used on a regular basis prior to the COVID-19 pandemic, appear to face significant issues in switching to online platforms in a larger scale. The COVID-19 pandemic demonstrates the need for States to allocate to further equip courts with all necessary equipment for on-line hearings. Moreover, in some States the judges appear to need to obtain further training and/or be provided with technical assistance to conduct online hearings.

41. While online sessions may be appropriate in some cases, such hearings must still find counter-balancing means to ensure the equality of arms. In particular, it remains of concern that the technical possibility of excluding a lawyer from online proceedings may be abused in disregard of the prohibition to do so in principle. Particularly in so far as national legal

124 The Council of Judges of Ukraine approved recommendations on the special quarantine regime. Most of the recommendations are reasonable, but some of them are against the law, – the CPLR experts believe, CPLR, 23-30 March. https://pravo.org.ua/en/review/points/March_points_2020/#The%20Council%20of%20Judges%20of%20Ukraine%20approved%20recommendations%20on%20the%20special%20quarantine%20regime.%20Most%20of%20the%20recommendations%20are%20reasonable,%20but%20some%20of%20them%20are%20against%20the%20law,%20%E2%80%93%20the%20CPLR%20experts%20believe (Accessed 20 April 2020).
frameworks have not yet defined the procedures for online proceedings, the ICJ stresses the need to apply all the guarantees which would otherwise be put in place in order to ensure that the proceedings meeting the requirements of fairness, impartiality and equality of arms. Forceful exclusion of lawyers from online proceedings may also amount to a breach of lawyers’ independence and professional guarantees.

42. Judiciaries and other State authorities need to ensure respect for international and regional standards that already provide guidance on the general parameters for substituting video-link or other forms of participation, without the person’s freely given consent, in hearings for which physical presence would ordinary be required:

a. Physical presence is particularly essential for the accused and his or her lawyer in criminal trials, and for a person deprived of liberty in the review of his or her detention, at least where the person has not freely given consent to participation by video or other means.\(^\text{125}\) It is difficult to see how in any circumstances proceeding with a criminal trial or detention review in which the accused or detainee is deprived of his or her right to physical presence, by imposing participation restricted to video-conferencing or other such means only, could be compatible with the right to a fair trial and right to liberty.

b. In other types of proceedings, judges must make an individual assessment, with reasons, on whether substituting videoconferencing for physical presence was compatible with the character of a particular hearing (i.e. physical presence may be indispensable where testimony of the person, and assessments of credibility, are key) and sufficiently counter-balanced by compensating measures.\(^\text{126}\)

c. Even where video-conferencing has been found, in principle, to be acceptable, the European Court has found violations where insufficient attention was given to ensuring adequate confidential access of the accused or defendant to their lawyer before and during the hearing, particularly where the client can only interact with the lawyer through a video-conferencing system installed and operated by the State.\(^\text{127}\)

\(^{125}\) E.g. European Court of Human Rights, Sakhnovskiy v Russia (Grand Chamber, 2010 http://hudoc.echr.coe.int/eng?i=001-101568, para 96); Repashkin v Russia no. 2 (2010 http://hudoc.echr.coe.int/eng?i=001-102282, para 154); Human Rights Committee GC 35, paras 34, 35 and 42.


\(^{127}\) See Sakhnovskiy (2010 paras 98 to 107 and 2018, paras 41 to 48) and Gorbunov and Gorbachev v Russia (2016 http://hudoc.echr.coe.int/eng?i=001-160993, para 37).
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